

Claimant contends he was injured on May 9, 2003, when he bumped his shoulder on a rack while driving a forklift. This accident is alleged to have occurred just before claimant's lunch break. He left the warehouse and went to a car in the parking lot to eat

his lunch. While there, claimant discovered that he could not lift his arm. Claimant was attempting to reach or stand up when his arm seemed to pop out of joint.

Immediately thereafter, claimant reported his injury and was sent by respondent to Concentra Medical Center. That same day he was sent to Shawnee Mission Medical Center for x-rays which showed an anterior dislocation of the left "humeral head."<sup>1</sup>

In his April 26, 2004 letter to claimant's counsel, Fernando M. Egea, M.D., opined that although it was possible for certain types of dislocations to occur as claimant described, an anterior dislocation would be immediately quite painful.

I received your letter dated April 2, 2004, in which you ask if it is possible for Mr. Espicueta to have a dislocated shoulder and not know about it until later on, about 5 to 10 minutes from the time of the injury when he went for lunch?

It all depend[s] of the type of dislocation, anterior and posterior shoulder dislocation are very painful and difficult to tolerate as well as difficult to reduce, most of the times required the patient to be under anesthesia or some sort of relaxant [Valium IV, etc] to reduce them successfully.<sup>2</sup>

Likewise, Tell B. Copening, M.D., indicated that it was not medically possible for claimant to have dislocated his shoulder and suffer only minimal pain only to have it drop out of its socket 30 minutes later.<sup>3</sup>

This claim has been the subject of three (3) preliminary hearings, which were conducted on August 7, 2003, July 8, 2004, and January 6, 2005. In addition, claimant presented the testimony of two (2) witnesses by deposition; namely, Marianna Medina and William Colado. At the August 7, 2003 preliminary hearing, claimant described his accident as follows:

A. (Mr. Espericueta) I was trying to go in with the forklift and instead of going in when I was doing it I hit the rack.

Q. (Mr. Herdoiza) When you hit the rack what happened?

A. I hit my shoulder. I didn't really pay too much attention.

. . . .

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<sup>1</sup> P.H. Trans. (July 8, 2004), Cl. Ex. 2; and Appellant's Brief (filed Feb. 11, 2005), Ex. A.

<sup>2</sup> Appellant's Brief (filed Feb. 11, 2005), Ex. B.

<sup>3</sup> P.H. Trans. (Aug. 7, 2003), Resp. Ex. A.

Q. So you struck your left shoulder against your own pallet jack?

A. Yes.

Q. Were you able to continue working after that accident?

A. I pulled out what I needed to pull out and delivered it where I needed to deliver it. I left the pallet jack where I need to return it and then I went to lunch.<sup>4</sup>

. . . .

A. I went outside with the pain and about 20-25 minutes later when we were going back inside I got out of the car, stood up and I just felt like that my arm went down.<sup>5</sup>

Claimant testified that about five (5) or ten (10) minutes elapsed between the time he hit his shoulder and when he went to lunch. He said that although he had pain in his shoulder, it felt like it was getting better. But by the time he finished eating his lunch, about 20 to 25 minutes later, he could not raise or extend his left arm. Claimant immediately went to the office and reported his injury. Claimant denies doing anything during his lunch break to injure his shoulder. Claimant also denies having any prior left arm or shoulder problems.

An adjustor for respondent's insurance carrier took a recorded statement from claimant.<sup>6</sup> In that statement, claimant described the accident as occurring shortly before his break. Although it resulted in an immediate onset of pain, claimant did not report it immediately because he was "embarrassed."

Q. (Pauline Czaplinski, Adjustor) And can you tell me what happened?

A. (Mr. Espericueta) I'm kind of new so, I didn't really know how to drive it. I, I hit ah, instead of pressing on the brake, I hit the gas, and I hit with my shoulder, one of the racks.

. . . .

Q. And what time of day did this happen?

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<sup>4</sup> P.H. Trans. (Aug. 7, 2003) at 8 and 9.

<sup>5</sup> *Id.* at 23.

<sup>6</sup> P.H. Trans. (Jan. 6, 2005), Cl. Ex. 2. The statement begins with the adjustor giving the date as May 9, 2003. However, at page 2 of the Statement, May 9, the date of accident, is described as having been "last Friday."

A. Ah, the accident happened around 10:45, and then we went on break, and ah, then that's when I feel my hand fall off.

. . . .

Q. It didn't hurt at the time? Did it hurt at the time you hit on the rack?

A. Yeah, it was hurting, but I, I was, I wanted to finish what I was doing, so I continued working quickly.

. . . .

Q. Okay. Now you said you didn't have pain until you went on break or didn't drop until you went on break?

A. Right. I guess it cooled off and that's when I was eating, I picked it up and it fell off.

. . . .

Q. Okay. The [sic] actually, when it , when it actually started hurting then, was it when you hit it or when you were on break and, and eating?

A. When I was eating.

Q. So it didn't hurt before that or drop?

A. It did hurt right away, but I didn't pay much attention until later on when it cooled off.

Q. Okay. Were you able to move it right afterwards?

A. Yeah, but it was painful.

Q. Okay. Did you report it to anyone?

A. No.

Q. Okay. Did you, ah, why didn't you report it?

A. I was embarrassed, because I was new so I embarrassed to say anything.

. . . .

Q. Okay, and were you doing anything at the time when it fell? You were just sitting there and it fell or what?

A. We were sitting there in the car when I try to lift it and, and that's when he [Mr. Colado] saw, and he helped me.

Q. Okay and tried to lift, lift it, did you have anything in your hand when you were trying to lift it?

A. No, nothing.<sup>7</sup>

The adjustor also obtained a recorded statement from Mr. Colado. Mr. Colado confirmed that he witnessed claimant having shoulder problems while they were eating lunch together in a car and that claimant said he had injured his shoulder earlier that day.

Q. (Pauline Czaplinski, Adjustor) Okay, and um, it [is] my understanding that during this lunch period ah, at some time, Hector's shoulder went out sort of speak. Do you recall anything about that?

A. (Mr. Colado) We were having lunch, and then I heard him say his arm was hurting a lot and then he just, he was just like, like in real pain, and then he said, I think my ah, shoulder must be out of place because he said I can't even raise it up. Then I, I just helped him get out of the car. I just hold his hand because he couldn't raise it up, and I just \_\_\_\_\_ to the office. I just took him to the doctor.

. . . .

Q. Okay, and um, when you were walking to the car or going to, to lunch was there any indication or mention of any shoulder injury?

A. When, when we were, when we were in the car, he did mention he had, had an accident.<sup>8</sup>

In his October 11, 2004 deposition testimony, Mr. Colado described the incident as follows:

A. (Mr. Colado) It was not time to go back but it was about 11:20 I believe and I guess he was trying to raise his hand up to put on the car seat and when he got up to like here he couldn't move it up or down and then he started screaming. And then my mom told me to help him and asked him what was wrong and he said he couldn't move his hand. So I helped him. I got out of the car and helped him raise his hand up and I took him to the office.

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<sup>7</sup> P.H. Trans. (Jan. 6, 2005), Cl. Ex. 2.

<sup>8</sup> *Id.*, Cl. Ex. 1.

A. He just said his arm was hurting. So my mom asked him what happened. She asked me to help him and take him to the office because he explained that he had had an accident at work but he was embarrassed to say he had an accident at work. So he never said anything.<sup>9</sup>

Mr. Colado immediately took claimant to the office where they reported the accident and claimant was sent to get medical treatment. Mr. Colado translated into English claimant's description of the accident for Lisa Livingston, respondent's human resources person.

A. (Mr. Colado) I said he had an accident trying to take a pallet out of the way and he pulled it off with the jack and he said the jack wasn't working properly and he hit himself with the rack.

Q. (Mr. Herdoiza) Is that what Mr. Espericueta told you happened?

A. Yes.

Q. When was that? Was that in the car?

A. When we were in the car explaining that to my mom.

Q. That's when he said he didn't want to have any trouble. That's why he didn't say anything?

A. Yes, that's right.

Q. Did he say that happened in the same day?

A. That same day early before lunch.

Q. Did he say it happened right before lunch or a long time before lunch or the beginning of the day? Did he tell you when it happened?

A. He said right before lunch.

Q. So you explained this to Lisa?

A. Yes.<sup>10</sup>

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<sup>9</sup> Colado Depo. at 10 and 12.

<sup>10</sup> *Id.* at 15 and 16.

The other person in the car, Marianna Medina, also testified by deposition. Her description of events was similar to Mr. Colado's.

Claimant testified that he injured his shoulder while working. This is consistent with what he told respondent's representatives, as well as with what he told all the medical providers and the other witnesses. Claimant also testified that he experienced an immediate onset of pain but that it got worse about 20 or 30 minutes later while he was eating his lunch. Although the two individuals claimant was eating lunch with did not initially notice claimant to be in pain, they both testified that claimant immediately attributed his symptoms to an earlier accident at work. Furthermore, there is no evidence of claimant suffering an accident or any trauma during his lunch break. Drs. Copening and Egea discount a scenario whereby claimant would suffer trauma but not experience an onset of pain for 20 or 30 minutes or where the shoulder would not dislocate for 20 to 30 minutes. This is not, however, the precise factual scenario to which claimant testified. Rather, claimant testified to an immediate onset of pain but with a subsequent worsening. Nevertheless, it did take a period of time before claimant experienced an inability to raise his arm.

Based upon the record presented to date, the Board finds that more probably than not claimant suffered an accidental injury as alleged. The Board finds claimant suffered personal injury by accident arising out of and in the course of his employment with respondent and that the ALJ's award of preliminary benefits should be affirmed.

**WHEREFORE**, it is the finding, decision and order of the Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated January 10, 2005, is hereby affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2005.

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BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant  
Christopher J. Carpenter, Attorney for Respondent and Sentry Insurance Company  
Robert H. Foerschler, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director